

Qwest.



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August 28, 2007

Via Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

GRANTED

AUG 31 2007
Marcia Mahon
WIRELINE COMPETITION BUREAU

Re: WC Docket No. 06-111 – Domestic Section 214 Application for Transfer of Control of OnFiber Communications Inc. to Qwest Communications Corporation

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Dear Ms. Dortch:

Qwest Communications Corporation (“QCC”) hereby submits this letter to notify the Commission that the terms of QCC’s commitment to sell Indefeasible Rights of Use (“IRUs”) in certain specified strands of fiber in lateral connections to five buildings no longer applies to one of those five buildings because an unaffiliated third party carrier today is operating its own fiber-based lateral connection to that building. QCC also submits this letter to notify the Commission that another of the five buildings should not be subject to the IRU commitment because it meets the screen test for divestiture set forth by the Department of Justice (“DoJ”) and adopted by the Commission in other merger proceedings. Finally, QCC submits this letter to inform the Commission of its good faith efforts over the past 12 months to sell IRUs in lateral connections to any remaining buildings subject to the IRU commitment.

On May 22, 2006, QCC and OnFiber Communications, Inc. (“OnFiber, and, together with QCC, the “Applicants”), filed a Joint Application pursuant to section 63.04 of the Commission’s rules requesting Commission authority to transfer control of OnFiber and its subsidiaries to QCC.¹ OnFiber at the time served – and it today continues to serve –

¹ See FCC Public Notice, “Domestic Authorization Granted, Application for Transfer of Control of OnFiber Communications, Inc., to Qwest Communications Corporation,” DA 06-1755, rel. Aug. 31, 2006, (“Public Notice”) at 1 (citing Joint Application for Consent to Transfer of Control of Domestic 214 Authorization, WC Docket No. 06-111, filed May 22, 2006 (“Joint Application”)).

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approximately 250 enterprise and carrier customers in a total of 19 major metropolitan areas nationwide.² As a general matter, the QCC and OnFiber businesses were at the time – and today remain – highly complementary, with OnFiber owning or controlling fiber-based lateral connections principally outside the Qwest Corporation (“QC”) 14-state region³ and, at the time the transfer of control was consummated, into only five buildings in the QC region where no other competitive carrier was present.⁴

The DoJ evaluated QCC’s acquisition of OnFiber under the Hart-Scott-Rodino Act and terminated its investigation of the transaction within 30 days without requiring QCC or OnFiber to divest any assets, including any fiber strands or lateral connections, or to address any competition-related concerns. But in the interest of time, and because the Applicants sought to accelerate the Commission’s review so they could, for business reasons, consummate the transfer of control as quickly as possible, QCC, as the acquiring carrier, voluntarily committed to sell, post-transaction, IRUs in certain specified strands of fiber in lateral connections to five buildings in the QC region where no carrier other than QC or OnFiber at the time was present.⁵ The Commission adopted QCC’s voluntary commitment as a condition when it approved the transfer of control.⁶

In its Commitment Letter, which the Commission adopted in its entirety, QCC stated that “[t]o the extent an unaffiliated third party establishes a lateral connection, through facilities of its own or through a lease arrangement, including any IRU and regardless of capacity, to [one of the five buildings], then the commitment set forth in this letter should no longer apply with respect to that building as of the date such unaffiliated third party lateral connection becomes operational or on the effective date of the lease arrangement.”⁷ QCC stated further that “[i]f and when this occurs, QCC shall notify the Commission that the commitment set forth in this letter no longer

² See Joint Application at 2. OnFiber continues to operate today as a subsidiary of QCC.

³ Qwest Corporation is an affiliate of QCC that operates as an incumbent local exchange carrier in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming.

⁴ See Amendment to Joint Application for Consent to Transfer of Control of Domestic 214 Authorization, WC Docket No. 06-111, filed June 22, 2006 (“Amendment”), at 2.

⁵ See Letter from Yaron Dori to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-111, dated Aug. 29, 2006, (“Commitment Letter”) (setting forth voluntary commitments).

⁶ See Public Notice at 1 (citing Commitment Letter).

⁷ Commitment Letter at 2.

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applies with respect to that building.”⁸ Consistent with these statements, QCC hereby notifies the Commission that QCC no longer is required to sell IRUs in the lateral connection to the building located at 3030 North Cascade, Colorado Springs, Colorado, because at least one unaffiliated third party has established and is operating its own fiber-based lateral connection to this building. Specifically, the customer served by OnFiber in this building informed OnFiber on July 6, 2007, that it wished to cancel the circuit and terminate its service arrangement with OnFiber. Since that time, OnFiber has terminated service to this customer and it is QCC’s understanding that [BEGIN CONFIDENTIAL] [END CONFIDENTIAL] is now serving the customer through its own fiber-based lateral facility to the building. The operation of this additional fiber-based carrier at this location means that this building no longer is subject to the Commission’s condition.

Shortly before QCC voluntarily committed to make available for sale the IRUs in question, the DoJ filed testimony in the U.S. District Court’s review of the SBC/AT&T and Verizon/MCI transactions under the Tunney Act.⁹ That testimony specified publicly for the first time the standard under which two merging carriers serving the same markets would be required to divest fiber lateral connections to buildings.¹⁰ Although the DoJ presumably used this standard to evaluate – and ultimately to approve without conditions – QCC’s acquisition of OnFiber, and although the Commission used this same standard to evaluate the SBC/AT&T,¹¹ Verizon/MCI,¹² and AT&T/BellSouth transactions,¹³ QCC was not privy to the specifics of this

⁸ *Id.*

⁹ See generally Majure Decl. at ¶¶ 2-3; Reply Declaration of W. Robert Majure, *United States v. SBC Corp.*, Nos. 05-2102, 05-2103 (D.D.C. Sept. 21, 2006) (“Majure Reply Declaration”), at ¶ 42, n.114.

¹⁰ *Id.*

¹¹ See, e.g., *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18310 (¶ 40) (2005) (“SBC/AT&T Order”) (finding the Commission’s competition analysis to be consistent with that of the DoJ, and finding further the DoJ’s response adequate to remedy the anti-competitive effects of the proposed merger).

¹² See *In the Matter of Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18453 (¶ 40) (2005) (“Verizon/MCI Order”) (finding the Commission’s competition analysis to be consistent with that of the DoJ, and finding further the DoJ’s response adequate to remedy the anti-competitive effects of the proposed merger).

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standard until the DoJ disclosed it publicly for the first time in the Tunney Act proceeding and the Commission subsequently expressly adopted it.¹⁴ As a result, and because QCC and OnFiber sought to accelerate the Commission's review of their transaction so they could, for business reasons, consummate the transfer of control as quickly as possible, QCC did not have an opportunity to demonstrate to the Commission that its transaction satisfied the standard and instead simply volunteered to sell the IRUs in question.

In evaluating the SBC/AT&T, Verizon/MCI, and AT&T/BellSouth transactions, it is now readily apparent that the DoJ assessed the potential for anticompetitive harm by (1) identifying each building into which the total number of providers serving the building would decline from two to one as a result of the proposed merger; and (2) determining whether a CLEC was unlikely to connect the building to its network post-merger.¹⁵ To determine whether a CLEC was "unlikely" to connect the building to its network post-merger, the DoJ compared the likely cost of constructing a lateral to the building (based primarily on the distance from the building to available fiber) to the revenue a CLEC likely would earn from serving the building (using circuit capacity as a proxy for customer demand and, thus, revenue).¹⁶ The DoJ used the following "screens" for the purpose of this assessment:

| Building Need Not Be Divested If | | |
|---|--------------|-----------------------------------|
| Minimum Demand Is | & | Other CLEC Fiber Is Within |
| 2 DS3s | | 0.1 mile (528 feet) |
| 1 OC-12 | | 0.25 mile (1320 feet) |
| Over OC-48 | | 1 mile (5280 feet) |

Additionally, the DoJ determined that "[i]n some cases, a building was eliminated [meaning, the lateral connection did not have to be divested] because there was unlikely to be competition in the future for its business."¹⁷

¹³ See *AT&T/BellSouth Order*, 22 FCC Rcd at 5682, 5685 (¶¶ 42, 46) (finding "the Applicants' use of various screens to eliminate particular buildings as being of no competitive concern [to be] . . . both reasonable and consistent with the approach the DoJ adopted").

¹⁴ The Commission subsequently disclosed the standard in the AT&T/BellSouth proceeding. See *id.* at ¶ 42, n.114.

¹⁵ See Majure Decl. at ¶¶ 12, 15-18; see also *supra*, notes 19, 20, 21.

¹⁶ See Majure Decl. at ¶ 14

¹⁷ *Id.* at ¶ 14, n.17.

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With this as background, it is clear that QCC did not need to voluntarily commit to sell IRUs in its lateral connection to the building located at 106 Grant Way, Moxee, Washington for the Commission to find that QCC's proposed acquisition of OnFiber was in the public interest. This is because the building at this location satisfies the DoJ and Commission screen test. Specifically, OnFiber serves this building using [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL]. At least one other CLEC owns or controls fiber located within one mile of the building. Specifically, [BEGIN CONFIDENTIAL]

[END CONFIDENTIAL].¹⁸ Because the screen test requires only that other CLEC fiber be within one mile of a building when customer demand in the building requires an OC-48 connection or greater, and here at least one other CLEC owns or controls fiber within 0.10 mile of the building, this building clearly meets the screen test.

With respect to the remaining buildings, QCC clearly undertook diligent and commercially reasonable efforts to sell the IRUs in question. Specifically, approximately 60 days from the date on which the transfer of control was consummated, QCC mailed initial offer letters to a total of 44 entities that it determined could potentially be interested in purchasing the IRUs. These entities ranged from large, national carriers such as AT&T and Verizon to small, regional providers whose service regions encompass the areas in which one or more of the five buildings are located.

QCC proceeded methodically and undertook several steps to maximize the number of entities to whom it would send these initial offer letters. QCC started with a list of customers to whom it or its affiliates previously sold dark fiber. QCC then added the names of major carriers of which it was aware who provide local data services to business customers and whose names were not already on the list. QCC also added the names of CLECs that appeared on lists of certificated carriers issued by the state public utility commission in each of Colorado, Oregon and Washington (the states in which one or more of the buildings are located) that were known by QCC to provide local data services to businesses. QCC also consulted the Telcordia Local Exchange Routing Guide database to add entities that provided service in the affected states who were not already on the list. Finally, QCC transmitted the list to its company state president in each of Colorado, Oregon and Washington to determine whether QCC may have overlooked a carrier with a business presence in the state.

¹⁸ See Amendment at 4, ¶ 5 and Attachment A (identifying this carrier as [BEGIN CONFIDENTIAL] [END CONFIDENTIAL]).

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QCC's initial offer letters indicated that QCC was making available IRUs in lateral connections to certain buildings (the letter provided the address of each building) and asked interested entities to return an executed Nondisclosure Agreement if they were interested in learning more about them. QCC received responses from six of the 44 entities to whom it sent initial offer letters and executed Nondisclosure Agreements with each of these six entities between mid-November and mid-December of 2006.¹⁹ QCC then mailed additional packets of information to each of the six entities containing (1) detailed "as-built" drawings for each lateral connection into the five buildings; (2) a draft IRU Agreement; (3) a copy of the Public Notice and Commitment Letter describing the terms of the Applicants' proposed sale of the IRUs; and (4) a process letter asking each entity to respond with a non-binding indication of interest by January 18, 2007.

Each of the six entities that executed the Nondisclosure Agreement confirmed to QCC that it received the packet of information that QCC subsequently sent. But, by the January 18, 2007, deadline, only three of the six entities had responded to QCC, each with an indication that it was not interested in purchasing any of the IRUs or in learning more about them. On January 22, 2007, QCC e-mailed the three entities from whom it had not yet heard. One responded that it was not interested in purchasing the IRUs, and, after a number of subsequent follow up attempts by QCC, each of the remaining two entities also informed QCC that it was not interested in purchasing any of the IRUs.

To ensure that carriers remained aware of QCC's offer to sell the IRUs, QCC in January 2007 arranged for its affiliate, QC, to post to the "Customer Notice" section of its Wholesale Website a description of the commercial availability of the IRUs. QC typically does not post such information on its Wholesale Website but it did so in this case as an added measure in an effort to sell the IRUs. It is QCC's understanding that, as of the date of this submission, the posting on its Wholesale Website has been viewed a total of nine times, but no entity has contacted QCC as a result or otherwise expressed an interest in acquiring or learning more about the IRUs.

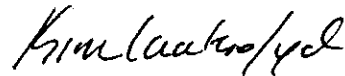
¹⁹ As an added measure, QCC in mid-November telephoned or sent e-mails to points of contact at 35 of the 44 initial entities (those for whom it had up-to-date contact information) to confirm that they had received the initial offer letter and to determine whether they intended to execute the Nondisclosure Agreement so they could receive additional information.

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In sum, based on QCC's good faith efforts to divest the IRUs in question, QCC respectfully requests that the Commission waive in these exceptional circumstances any divestiture condition to which QCC may still be subject in this proceeding.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kim Laakso".

Kim E. Laakso

cc: Tom Navin, FCC
Don Stockdale, FCC
Nicholas Alexander, FCC
Bill Dever, FCC
Jodie Donovan-May, FCC